House Judiciary Subcommittee on the Constitution
Congressional Authority to Enact Choice Programs
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Thank you for the opportunity to testify on the questions presented to legislatures in the wake of the Supreme Court's decision *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002). This statement is submitted in my personal capacity as a scholar. I hold the Alice McKean Young Regents Chair in Law at The University of Texas at Austin, but of course The University takes no position on any issue before the Committee.

Before the Chairman invited me to testify, I had participated in the drafting of a joint statement, by constitutional scholars from across the political spectrum, for the very purpose of giving a fair explanation of the *Zelman* decision to legislators and policy makers. Rather than prepare a new statement of my own, I think it far better to submit this consensus statement.

I am honored to submit the *Joint Statement of Church-State Scholars on School Vouchers and the Constitution: What the United States Supreme Court Has Settled, What Remains Disputed.* The *Joint Statement* is the collaborative product of eight professors of constitutional law, each with a respected record of accomplishment in the field of religious liberty and church-state relations. The eight include strong opponents of vouchers, strong supporters of vouchers, and a wide range and variety of positions in between. Professor Thomas Berg, of the University of St. Thomas Law School in Minneapolis, carried the laboring oar in drafting the *Joint Statement*. He had a difficult task; each of his seven colleagues jealously reviewed every sentence he wrote for any hint of a tilt toward his personal position or away from someone else's. He patiently took account

of every criticism and every cavil. He did not paper over any disagreement; rather, whenever we could not agree, he put the point in terms of what each side would argue in future debates.

The result is a document that both sides of the aisle can rely on with confidence. When the *Joint Statement* says that something is settled, you can take it as settled. When the *Joint Statement* says that voucher supporters will argue such and such, and opponents will respond so and so, you can take it as a brief but sophisticated summary of the best foreseeable arguments for each side.

The Pew Forum on Religion and Public Life brought the eight of us together and published the *Joint Statement*. The statement is available on line at the Pew Forum's website, <*http://pewforum.org*>. It is important for me to emphasize that the Pew Forum, like The University of Texas, takes no position on any question before the Committee. The Pew Forum and The University, each in its own way, facilitate and support the work of independent scholars without taking positions on the substance of that work.

Part I of the *Joint Statement* summarizes the broad rule in *Zelman v. Simmons-Harris*. All eight of us agree that under *Zelman*, an educational voucher program is constitutional if it is neutral toward religion (which requires that it disburse funds to a class of beneficiaries defined without regard to religion, for use at a class of schools defined without regard to religion, and that it be structured in such a way that it gives no financial or other incentive to choose religious schools), if all moneys flowing to religious schools flow through the independent decisions of individuals rather than as direct payments from the government, and if the program offers genuine secular options to the beneficiaries.

The *Joint Statement* notes that "*Zelman* may have implications for the constitutionality of vouchers in other contexts, such as the provision of social services," but it does not address those implications. Some of the eight authors thought that other social services were sufficiently different from education that *Zelman* could not be straightforwardly applied to other services. Our agreement as to the current rules on schools does not necessarily imply agreement as to other social services.

Speaking for myself for a minute and not for my seven colleagues, my personal view is that *Zelman*'s principles apply to other social services, but that the structure of these programs will vary in ways that may affect the application of the principles. Most important, every school district in every state undertakes to provide a free and continuous public education to every child within the jurisdiction; if the school population increases, schools adapt to admit them all. It is thus relatively easy to structure a school voucher program in ways that meet the tests of religious neutrality, private decision making, and genuine choice.

Many other government-funded social services are offered on a much less inclusive basis. Places are often limited; potential clients are turned away or put on waiting lists; some programs come and go; there is no credible commitment to serve all in need. Until and unless these limitations in social service programs are corrected, it will be more difficult to guarantee genuine secular choices in every program. But assuming that *Zelman* applies to other social services -- and I personally believe that it does -- genuine secular choices are essential to the constitutionality of voucher programs.

I should also emphasize the second *Zelman* principle: that funds flow to religious institutions through private decision makers and not by direct governmental grants. This means that *Zelman* has not overruled earlier cases placing tighter restrictions on direct grants of aid. The law on direct grants of aid remains

more restrictive, less settled, and subject to more fine distinctions, than the law on voucher plans.

Part II of the *Joint Statement* discusses constitutional issues after *Zelman* -- issues about the implementation of any voucher programs that are enacted. Part II.A deals with state constitutional limits. These limits do not apply to federal programs, although it is imaginable that state constitutional limits would prevent some states from participating in cooperative voucher programs designed to be federally funded but state implemented.

Part II.B discusses potential regulation of schools that accept vouchers. Here the *Joint Statement* replicates the debate that has divided Congress over the last two years. Some of the eight believe that some regulations -- those that require the schools that accept vouchers to surrender constitutional rights to speech, association, or free exercise of religion -- would be unconstitutional conditions. Some of the eight believe that all or most such conditions are at least unobjectionable, and that they may be constitutionally required. My own view is that this debate is not limited to education, but is fully applicable to vouchers for other social services.

The *Joint Statement* does not address any question whether vouchers are good policy. And it anticipates new constitutional questions about the way voucher programs are implemented. But eight scholars from across the spectrum were able to agree that the Supreme Court has given a reasonably clear answer to the most basic constitutional questions about voucher programs. Vouchers can be consistent with the federal Establishment Clause, and the Court has given reasonably clear guidance about how to design voucher programs so that they will be consistent with the federal Establishment Clause.